Public Bank Bhd v Ng Chee Ping & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-357 OF 1995
KAMALANATHAN RATNAM J
8 JULY 1998

Civil Procedure *— Third party proceedings — Striking out defendant's claim against receivers — Question of issue relating to or connected with the original subject matter — Whether necessary for cause of action to exist — Rules of the High Court 1980 O 16 r 1(1)(c)*

Companies and Corporations *— Receivership — Duties of receiver — Whether receiver owed a duty of care to borrower and/or to guarantors — Whether the receiver owed duty to borrower and/or guarantors to account for all rentals and receivables collected by receiver*

The plaintiff bank granted various facilities to CP Ng & Co ('the borrower'). Both defendants ('the guarantors') executed debentures in favour of the plaintiff as a guarantee for sums due to them. Subsequently, the plaintiff appointed a third party as receiver and manager of the borrower ('the receiver'). The plaintiff then brought an action against the guarantors for sums due under the facilities. The guarantors — relying on O 16 r 1(1)(c) of the Rules of the High Court 1980 ('the RHC') — took out a third party notice and served their statement of claim against the receivers. The issues were whether: (i) the receiver owes a duty of care to the borrower and/or to the guarantors; (ii) the receiver owes a duty to the borrower and/or the guarantors to account for all rentals and receivables collected by the receiver; and (iii) the receiver was and is at all material times acting under the direction and control of the plaintiff. The receiver applied to strike out the guarantors' statement of claim on all issues. The guarantors submitted that O 16 r 1(1)(c) did not require the need for a cause of action to exist, so long as there was a question of issue relating to or connected with the original subject matter.

Held, striking out the guarantors' statement of claim with cost:

(1) The receiver owed no duty of care to the borrower and/or to the guarantors. The receiver was only bound to act in good faith. In the present case, there was no pleaded cause of action for failure to act in good faith which allegation must be expressly pleaded and sufficiently particularized (see p 459C–D); *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938; *American Express International Banking Corp v Hurley; Hurley v American Express International Banking Corp* [1985] 3 All ER 564 not followed; *Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor* [1993] AC 295 followed; *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 distinguished.

(2) The receiver had no duty to account for the guarantors (see p 459E–H); *Malayan Prestressed Concrete Strand Manufacturing*

Sdn Bhd (Dalam penerimaan) & Satu yang lain lwn Malaysia Ropes Sdn Bhd [1991] 3 MLJ 482 followed.

(3) Since the receiver owed no duty of care to the guarantors, it was immaterial even if the receivers acted on the instructions of the bank which by itself did not create any independent duty of care. There could be no new cause of action against the receiver merely because the receiver acted on the instructions of the bank (see p 460A–B).

(4) The guarantors' claim under O 16 r 1 of the RHC must be premised on a cause of action. Furthermore, there was no need for the guarantors to rely on O 16 r 1(1)(c) to raise questions or issues relating to or connected with the original subject matter of the action against the receivers. Such information could be obtained from the receiver by serving subpoena unto him (see p 460E–H).

[Bahasa Malaysia summary

Bank iaitu plaintif telah memberikan pelbagai kemudahan kepada CP Ng & Co ('peminjam'). Kedua-dua defendan ('penggerenti-penggerenti') melaksanakan debentur memihak kepada plaintif sebagai gerenti untuk jumlah yang terhutang kepada mereka. Berikutnya, plaintif telah melantik pihak ketiga sebagai penerima dan pengurus peminjam ('penerima'). Plaintif kemudiannya membawa tindakan terhadap penggerenti-penggerenti untuk jumlah yang terhutang di bawah kemudahan tersebut. Penggerenti-penggerenti — dengan bergantung pada A 16 k 1(1)(c) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') — telah mengeluarkan notis pihak ketiga dan menyampaikan pernyataan tuntutan mereka terhadap penerima. Isu-isu adalah sama ada: (i) penerima mempunyai kewajipan berjaga-jaga kepada peminjam dan/atau penggerenti-penggerenti; (ii) penerima mempunyai kewajipan kepada peminjam dan/atau penggerenti-penggerenti untuk bertanggungjawab atas segala sewa dan 'receivables' yang dikutip oleh penerima; dan (iii) penerima telah dan pada semua masa material bertindak di bawah arahan dan kawalan plaintif. Penerima memohon untuk membatalkan pernyataan tuntutan penggerenti-penggerenti atas semua isu. Penggerenti-penggerenti menghujahkan bahawa A 16 k 1(1)(c) tidak memerlukan kewujudan kausa tindakan, asalkan terdapat persoalan isu yang berhubung atau berkaitan dengan hal perkara asal.

Diputuskan, membatalkan pernyataan tuntutan penggerenti-penggerenti dengan kos:

(1) Penerima tidak mempunyai apa-apa kewajipan berjaga-jaga kepada peminjam dan/atau penggerenti-penggerenti. Penerima hanya terikat untuk bertindak dengan suci hati. Dalam kes ini, tiada kausa tindakan yang diplidkan atas kegagalan untuk bertindak dengan suci hati yang mana pengataan mestilah

diplidkan secara nyata dan dinyatakan secara terperinci dengan secukupnya (lihat ms 459C–D); *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938; *American Express International Banking Corp v Hurley; Hurley v American Express International Banking Corp* [1985] 3 All ER 564 tidak diikut; *Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor* [1993] AC 295 diikut; *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd* [1997] 2 MLJ 805 dibeza.

(2) Penerima tidak mempunyai kewajipan untuk bertanggungjawab atas penggerenti-penggerenti (lihat ms 459E–H); *Malayan Prestressed Concrete Strand Manufacturing Sdn Bhd (Dalam penerimaan) & Satu yang lain lwn Malaysia Ropes Sdn Bhd* [1991] 3 MLJ 482 diikut.

(3) Memandangkan penerima tidak mempunyai kewajipan berjaga-jaga terhadap penggerenti-penggerenti, adalah tidak penting sekalipun penerima bertindak atas arahan bank yang mana dengan sendirinya tidak mewujudkan sebarang kewajipan berjaga-jaga yang bebas. Tidak mungkin terdapat kausa tindakan terhadap penerima semata-mata kerana penerima bertindak atas arahan bank (lihat ms 460A–B).

(4) Tuntutan penggerenti-penggerenti di bawah A 16 k 1 KMT mestilah berdasarkan suatu kausa tindakan. Tambahan pula, tiada keperluan untuk penggerenti-penggerenti bergantung pada A 16 k 1(1)(c) untuk membangkitkan persoalan atau isu yang berhubung atau berkaitan dengan hal perkara tindakan yang asal terhadap penerima. Maklumat sedemikian boleh diperolehi daripada penerima dengan menyampaikan sepina ke atasnya (lihat ms 460E–H).]

Notes

For cases on third party proceedings see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4810–4822.

For cases on receivership see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 366–416.

Cases referred to

American Express International Banking Corp v Hurley; Hurley v American Express International Banking Corp & Anor [1985] 3 All ER 564 (not folld)

Bank Bumiputra Malaysia Bhd v Galian Saham Sdn Bhd & Ors [1990]1 MLJ 185 (refd)

B Johnson & Co (Builders) Ltd, Re [1995] Ch 634 (refd)

Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd [1971] Ch 949 (refd)

Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor [1993] AC 295 (folld)

Gaskell & Anor v Gosling & Anor [1896] 1 QB 669 (refd)
Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (distd)
Lathia v Dronsfield Bros [1987] BCLC 321 (refd)
Malayan Prestressed Concrete Strand Manufacturing Sdn Bhd (Dalam penerimaan) & Satu yang lain lwn Malaysia Ropes Sdn Bhd [1991] 3 MLJ 482 (folld)
Malaysian Industrial Development Finance Bhd v Eureka Ferro-Alloy Sdn Bhd & Ors [1989] 1 MLJ117 (refd)
Smiths Ltd v Middleton [1979] 3 All ER 842 (refd)
Standard Chartered Bank Ltd v Walker & Anor [1982] 3 All ER 938 (not folld)
United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (distd)

Legislation referred to

Companies Act 1948 s 333 [UK]
Rules of the High Court 1980 O 16 r 1(1)(c)

ES Chua (*Iza Ng Yeoh & Kit*) for the plaintiff.
CC Low (*Lim Kian Leong & Co*) for the defendants.
S Suhendran (*Saheran & Woon*) for the third party.

Kamalanathan Ratnam J:

FACTS

The plaintiff granted various facilities to two borrowers, namely CP Ng & Co Sdn Bhd and CP Ng Holdings Sdn Bhd collectively called the borrowers and individually as CP Ng & Co and CP Ng Holdings. The defendants herein guaranteed the sums due under the facilities. CP Ng & Co executed debentures in favour of the plaintiff. Some time in 1988, and pursuant to the debentures created, the plaintiff appointed the third party as the receiver and manager of the said borrowers. This action is brought by the plaintiff against the defendants as guarantors for sums due under the facilities granted to CP Ng & Co.

Having filed their defence, the guarantors took out a third party notice and subsequently issued and served the defendants' statement of claim against the third party. The defendants' cause of action against the third party is premised on the determination by this court of three issues, namely:

(1) whether or not the third party owes a duty of care to the borrowers and/or to the defendants;

(2) whether the third party owes a duty to the borrowers and/or the defendants to account for all rentals and receivables collected by the said third party; and

(3) whether the third party was and is at all material times acting under the direction and control of the plaintiff.

THE APPLICATION TO STRIKE OUT

The third party having entered appearance applied by way of encl 66 to strike out the defendants' statement of claim against the third party (or portions thereof) on the ground that he owed no duty of care to the borrowers and/or the defendants nor did he owe a duty to them to account for any rentals or receivables and that in the event he acted under the control and/or direction of the plaintiff the effect would be to make him, the third party, the plaintiff's agent and in which event the defendants would have no cause of action against him because such purported cause of action, if any, would lie against the principal, namely the plaintiff.

FINDINGS OF THE COURT

Is there a duty of care?

The defendants contend that there is a duty of care owed by the receiver and manager to both the borrowers and the defendants to reduce the amounts owing to the bank and the allegation is that by doing nothing to collect debts owing to the borrowers, the receiver and manager had thereby failed to reduce the interest, thus breaching their duty of care.

The defendants in their statement of claim have specifically pleaded that the existence of the duty of care on the part of the third party arose as a result of the receiver and manager 'having control of CP Ng & Co, since 1988'('the borrower').

Need for historical review

In order to consider this aspect of the defendants' case, namely the existence and extent of the receiver's and manager's duties to a surety, it is relevant to fall back upon the law of mortgages as existed in England.

In *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805, the (then) Supreme Court summarized that a mortgage of property in England involves the transfer of the legal estate from the mortgagor to the mortgagee subject to a reconveyance upon payment of the principal and interest. In fact, the rights and powers of the mortgagee flow from the mortgagee's ownership of the legal estate. However, equity always regarded the mortgagee as having taken only such an estate as was required in respect of the mortgage. It therefore became necessary for equity to intervene and impose equitable duties. In fact in *Gaskell & Anor v Gosling & Anor* [1896] 1 QB 669 at p 691 in giving his dissenting judgment, Rigby LJ voiced the view that such duties were so stringent as to amount to being penal in nature. This decision was upheld by the House of Lords (see *Gosling v Gaskell & Grocott* [1895–99] All ER 300).

A way was found to assist the mortgagee to escape such stringent duties. Mortgagees were thus allowed to appoint an out of court receiver and for whom the mortgagee was not responsible. In fact at p 692 Rigby LJ said:

> ... Though it was the mortgagee who in fact appointed the receiver, yet in making the appointment the mortgagee acted, and it was the object of the parties that he should act, as agent for the mortgagor. Lord Cranworth, in *Jefferys v Dickson* (LR 1 Ch 183 at p 190), stated the doctrine of Courts of Equity on the subject to the effect following. The mortgagee, as agent of the mortgagor, appointed a person to receive the income, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions were supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver therefore, in relation between himself and the mortgagor, stood in the position of a person appointed by an instrument to which the mortgagee was no party.

Donovan on Company Receivers and Managers stated at para 11.410 (at p 4051) that:

> ... the courts tended to apply the analogy of a mortgagee exercising a power of sale to determine the scope of a receiver's duties in this context. Thus, a receiver exercising a power of sale was expected to act in good faith for the purpose of obtaining repayment of the secured debt.

It would seem therefore that a mortgagee was only required to act in good faith. Thus, by application of analogy, the receiver was held to be liable only when he acted in bad faith or acted in excess of his authority.

Subsequent development in the law

Whilst the historical view prevailed, the Court of Appeal in *Cuckmere Brick Co Ltd & Anor v Mutual Finance Ltd* [1971] Ch 949 extended the duties of mortgagees by imposing a duty of care to obtain the best possible price on the sale of any asset of the company. This is what Salmon LJ said at p 966:

> ... There are some dicta which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other dicta which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it ... .

At the same page he said:

> The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are 'neighbors'. Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits

A him, it would be strange indeed if he were under no legal obligation to take reasonable care to obtain what I call the true market value at the date of the sale.

The law of negligence had indeed caught up with mortgages through the march of time.

B Then a further development took place as a result of the decision in *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938. By reason of the application of the mortgagor/mortgagee analogy to a receiver, the Court of Appeal held that the duty of care owed by the receiver of a company under a debenture in disposing of the company's assets was owed not only to the company but also to a guarantor of the company's C liability under the debenture, since the liability of the guarantor depended on the amount which was realized by the assets and he was therefore within the test of sufficient proximity to the receiver for him to owe the guarantor a duty to use reasonable care to obtain the best possible price in the circumstances. Lord Denning MR held that the receiver owed this D duty not only to the company (of which he is the agent) to clear off as much of its indebtedness to the bank as possible, but he also owed a duty to the guarantor, because the guarantor was liable only to the same extent as the company. The decision in *Standard Chartered Bank* was followed by Mann J in *American Express International Banking Corp v Hurley; Hurley v American Express International Banking Corp & Anor* [1985] 3 All ER 564.

E Within our shores the then Federal Court in *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 considered the liability of a mortgagor and mortgagee and relying on *Cuckmere Brick* held that when exercising its power of sale the mortgagee is to take reasonable care to obtain a proper price and that by virtue of F *Standard Chartered Bank* such a duty of care had also been extended to guarantors. It is relevant to point out that this case did not consider the position of a receiver and manager, otherwise I would have to be bound by the principle of stare decisis and need not consider this case any further.

Subsequently in *Bank Bumiputra Malaysia Bhd v Galian Saham Sdn* G *Bhd & Ors* [1990] 1 MLJ 185, Peh Swee Chin J (as he then was) relying on *Standard Chartered Bank* applied the principle of a duty of care but found on the facts that the chargee had not been in breach of the duty of care.

In *Malaysian Industrial Development Finance Bhd v Eureka Ferro-Alloy* H *Sdn Bhd & Ors* [1989] 2 MLJ 117, Siti Norma Yaakob J (as she then was) rejected a submission by the mortgagee that the guarantors had a cause of action directly against the receiver based on the guarantors' own submission that the receivers had breached their duty to sell. Instead, in dismissing the plaintiff's appeal against the senior assistant registrar's decision in allowing the guarantor's application to set aside the default judgment obtained by I the plaintiff/mortgagee, she considered the fact that since allegations had been made that the receivers had failed to consider the guarantors' interests when exercising the power of sale, the issue as to whether the plaintiff could be held liable for such omissions by the receivers was a matter best left to be decided at trial.

It would seem that tortious liability upon receivers had made a firm footing upon our soil.

Present view of the law

However in 1993, the Privy Council made a very important decision on this matter. The case was *Downsview Nominees Ltd & Anor v First City Corp Ltd & Anor* [1993] AC 295. A company issued a first debenture to a bank and a second debenture to the first plaintiff. Pursuant to its powers under the second debenture, the first plaintiff appointed receivers and managers of the company. The first debenture was assigned to the first defendant, which was controlled by the second defendant, who was appointed receiver and manager under that debenture not for the purpose of enforcing the security thereunder but to disrupt the receivership under the second debenture and to prevent the enforcement of the second debenture by the first plaintiff. The receivers appointed by the first plaintiff relinquished control to the second defendant. Four days later the first plaintiff offered to purchase the first debenture from the first defendant at a price equivalent to the amounts outstanding and secured under the debenture, but that offer was not accepted. The company continued trading and during the second defendant's receivership, substantial losses were incurred. Eventually, as directed by the court, the first defendant assigned the first debenture to the first plaintiff and the second defendant ceased to act as receiver. The first plaintiff assigned the second debenture to the second plaintiff. The trial judge held that the defendants were liable in negligence for breach of duty to the plaintiffs, and awarded damages against both defendants. The Court of Appeal of New Zealand allowed the defendants' appeal in part and quashed the judge's orders in so far as they related to the first defendant and the second plaintiff.

The Privy Council in dismissing the appeal and allowing the cross-appeal, held that a mortgagee and a receiver and manager appointed by him owed no general duty in negligence to subsequent encumbrancers or the mortgagor to use reasonable care in the exercise of their powers and in dealing with the assets of the mortgagor; but that equity imposed on a mortgagee and a receiver and manager specific duties including the duty to exercise their powers in good faith for the purpose of obtaining repayment although, subject to that duty, the exercise of their powers might cause detrimental consequences to the mortgagor, that the equitable duty was owed both to the mortgagor and to any subsequent encumbrancer, whether he was a mortgagee, debenture holder or charge holder; that, accordingly, since the receivership of the second defendant had been instigated by him for improper purposes and conducted in bad faith, and the first defendant had been in breach of its duty in failing to transfer the first debenture to the first plaintiff when so requested by the first plaintiff, both defendants were liable to both plaintiffs; and that since the proper measure of damages for breach of their equitable duties was the same as that which would have been applicable if they had been liable in negligence, the judge's award of damages would be restored. By way of a clear signal, the Privy Council

warned against the extension of the law of negligence to supplement equitable principles and dangers of imposing such a duty upon a receiver and manager. In no uncertain terms, Lord Templeman said at p 316:

> The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss: see *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at p 1059; *Caparo Industrial Plc v Dickman* [1990] 2 AC 605 and *Murphy v Brentwood District Council* [1991] 1 AC 398. If the defined equitable duties attached to mortgagees and to receivers and managers appointed by debenture holders are replaced or supplemented by a liability in negligence, the result will be confusion and injustice. A receiver and manager liable in negligence will be tempted to sell assets as speedily as possible for the purpose of repaying the mortgage debt, a decision which, whether negligent or not, does not expose him to a suit for damages but may be disadvantageous to the company. A receiver who is brave enough to manage will run the risk of being sued if the financial position of the company deteriorates, whether that deterioration be due to imperfect knowledge or bad advice or insufficient time or other circumstances. There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently and fared better.

In the light of this decision, it would seem that the decision in *Standard Chartered Bank* and those that followed it, in so far as they advocate the imposition of a tortious liability by means of a breach of a duty of care upon the receiver in favour of the borrower and the guarantor must now be seen not to be good law. However, in so far as the borrower and the guarantor are concerned, I am bound by the decision of the then Federal Court in *United Malayan Banking Corp Bhd.* However, since the Federal Court in that case did not have to deal with the liability of a receiver and manager, I am at liberty therefore to consider if the other cases referring to the liability of a receiver and manager in negligence are still sustainable. It is my view that the decisions in *Bank Bumiputra Malaysian Bhd* and *(M) Industrial Development Finance Bhd* are both open to doubt.

The decision in *Downsview* takes the law back to the earlier and well-settled equitable duties of a mortgagee. The Privy Council was quick to point out that the receiver, when selling charged assets was to take care to obtain the proper price. Since the court had ruled out tortious liability, I can only conclude that such a duty referred to therein must be equitable in nature which only arises when there is a sale of the assets of the borrower. I must therefore conclude that in all other situations the receiver is only bound to act in good faith.

The defendants' reply to *Downsview* was two pronged. First, they argued that that case did not specifically deal with the duty of the receivers and managers towards guarantors whereas the case of *Standard Chartered Bank* and *Malaysian Industrial Development Bhd* did. Second, it was pointed out that *Downsview* was a case specifically dealing with 'subsequent encumbrancers'. In the circumstances, at most, it was argued, the comments made by the Privy Council with regard to the duties of a receiver and manager vis-a-vis a mortgagor, are merely obiter.

The submission of the defendants that *Downsview* did not consider the duties of the receiver and manager towards guarantors is illusory. Given that there is no duty of care owed to a borrower, with respect, it is no argument to suggest that there is a similar duty owed to the guarantor. Since the issue of liability attached is based on the 'proximity' test, and since it was held in *Standard Chartered Bank* that the receiver and manager whilst owing a duty to the borrower also owed a duty to the guarantor because the guarantor was liable only to the same extent as the co-borrower, therefore based on the decision in *Downsview* since there was no duty of care owed to the borrower, there is therefore no duty of care owed to the guarantor.

It is obvious that the defendants rest their case on *Standard Chartered Bank* and *American Express* in support of the submission that the receiver owes a duty to guarantors. I find that the defendants have not considered the fact that these cases refer to a duty of care in negligence which is said to be owed by the receiver to the borrower and the guarantor. The Privy Council in *Downsview* has categorically stated that there is now no duty of care owed by the receiver and as such it is my judgment that the decisions in *Standard Chartered Bank* and *American Express* are no longer good law.

On the next issue that *Downsview* specifically dealt with the duties of a mortgagee and a receiver and manager to subsequent encumbrancers, and that the comment in relation to the duties of a receiver is merely obiter, I must hasten to add that in *Downsview* it was held that a duty of a receiver to a subsequent encumbrancer *was the same as the duty to a mortgagor*. There can be no room for doubt in the circumstances that the duty of a receiver to a mortgagor was also dealt with in *Downsview*.

The defendants also pointed out that the Privy Council in *Downsview* referred to the case of *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 which did not deal directly with the issues whether, and if so in what circumstances, a duty exists. It only considered the definition of 'managers' in the context of a suit under s 333 of the United Kingdom Companies Act 1948 for 'misfeasance'. The defendants also pointed out that our then Supreme Court in *Kimlin* had indicated that the case of *Re B Johnson* cannot apply in Malaysia on the same issue because the corresponding provisions of the Malaysian Companies Act are different. It was thus submitted that since *Re B Johnson* had discussed the claims made with regard to breaches of duty in relation to whether such allegations were sufficient to amount to 'misfeasance' under s 333 of the United Kingdom Companies Act 1948, that case therefore cannot be relied upon as denoting the law on duties of receivers and managers. It must be noted that the point submitted by the defendants is only one of the issues dealt with in *Re B Johnson*. With respect, it is my judgment that the duties of receivers and managers, as decided in *Downsview*, were never dealt with in *Kimlin*.

The defendants further argued that the duty in the present case must be considered in relation to receivers and managers. Therefore, it was pointed out that the duty of the receiver and manager must be wider than just a duty owing in the event of a sale, which is essentially a receiver's duty whereas it was argued the manager would also possess the power to inter alia manage the company, subject to the terms of the appointment. It was

thus argued that if the third party had failed to carry out its duties as a receiver and manager, then he would likewise have failed in his duty to reduce and/or extinguish the amounts owing to the plaintiff. Whether he did or not could only be determined at trial after this court had considered the relevant evidence and documents.

This argument of the defendants is totally flawed. In *Downsview*, Lord Templeman specifically considered the duties of the *receiver and manager*.. In fact, he said at p 312 of the judgment:

> The next question is the nature and extent of the duties owed by a mortgagee and a receiver and manager respectively to subsequent encumbrancers and the mortgagor.

In answer to the first question raised by the defence and in reliance on *Downsview*, it is my judgment that the receiver and manager, namely the third party, owes no duty of care to the borrower and/or to the defendants. There is no pleaded cause of action for failure to act in good faith. It must be noted that an allegation of failure to act in good faith is tantamount to an allegation of fraud and which allegation must be expressly pleaded and sufficiently particularized.

Is there a duty to account?

The third party contends that there is no duty to account to the guarantors. Before looking into the need to account to a guarantor, I must consider whether there is a duty to account first, to the borrower. In *Smiths Ltd v Middleton* [1979] 3 All ER 842, the court held that a receiver appointed under a debenture providing for him to be the agent of the debtor company had a duty to keep full accounts and to produce those accounts to the company when required to do so. It stands to logic that this duty to account to the borrower must exist because the borrower is entitled to the surplus assets after the conclusion of the receivership. However, in *Malayan Prestressed Concrete Strand Manufacturing Sdn Bhd (Dalam penerimaan) dan satu yang lain lwn Malaysia Ropes Sdn Bhd* [1991] 3 MLJ 482, Abdul Malek J (as he then was) held that a guarantor is not entitled to any interest in any assets of the borrower until the guarantor pays the sums claimed or pays that amount into court. I accept this decision as sound. It is clear that in the present case, the defendants have not as yet paid any sum under the guarantee nor was it submitted that any sum has been paid into court to equate the plaintiff's claim. Indeed, the defendants have sought relief for all sums payable by them to the plaintiff, to be paid by the receiver. Based on the authority of *Malaysian Prestressed Concrete*, I hold that the third party has no duty to account for the guarantors. This issue must therefore be answered against the defendants.

Whether the third party acting under plaintiff's directions?

The defendants argue that if the receiver acts under the instructions of the bank, then the third party or the bank is liable for the actions or inactions giving rise to the increase in the debts.

Since I have already found that the third party owes no duty of care to the guarantors, it is immaterial even if the receivers acted on the instructions of the bank which by itself does not create any independent duty of care. Needless to say the defendants' cause of action is against the bank and the bank becomes answerable for the actions of the receiver with no doubt a claim for indemnity available to the bank from the receivers. It is my judgment that there can arise no new cause of action against the receiver, merely because the receiver acts on the instructions of the bank.

In fact in *Lathia v Dronsfield Bros* [1987] BCLC 321, the court allowed the receivers' and managers' application to strike out the action against them as showing no reasonable cause of action. The court held that since the receivers and managers were, by the terms of their appointment made the agents of the first defendant company which was being sued for breach of contract, and that the agency was to enable the receivers and managers to carry on the functions of the first defendant company, and that therefore as agents they were immune from being sued as co-defendants for inducing the breach of the contract by their principal on which behalf they had acted unless they had not acted bona fide or acted outside the scope of their authority.

Third party proceedings

Finally, the defendants relied on O 16 r 1(1)(c) of the Rules of the High Court 1980 ('the RHC') which allows for any question or issue relating to or connected with the original subject matter of the action to be raised against the third party. It was submitted that this sub-rule did not require the need for a cause of action to exist, so long as there was a question of issue relating to or connected with the original subject matter. This argument lacks the sting it was intended to carry. Order 16 r 1 of the RHC continues to require the defendants to issue a third party notice containing a statement of the nature of the claim to be made against such third party or to state the question or issue required to be determined. Clearly therefore the defendants'claim must be premised on a cause of action.

It has been pleaded in paras 12 and 13.1 of the defendants' statement of claim against the third party that the third party was and is at all material times acting under the direction of the plaintiff. In that case, it is obvious that it is the claim of the defendants that the third party was the agent of the plaintiff. Any question or issue to be decided therefore in respect of the receiver ought to be raised by way of defence or counterclaim against the plaintiff. The receiver could be subpoenaed to give evidence. There is no need to make the receiver a third party purely to elicit information.

In the circumstances, I order that the defendants' statement of claim dated 3 February 1998 filed against the third party be struck out with costs and that the suit be set down for trial between the plaintiff and the defendants. This case is fixed for case management to 20 July 1998.

Defendants' statement of claim against the third party struck out with cost.

Reported by Mohd Rizal Abidin